No. 83-371

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FEDERAL COMMUNICATIONS COMMISSION, *et ano.*,
Petitioners,

v.

ITT WORLD COMMUNICATIONS INC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT ITT WORLD COMMUNICATIONS INC. IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court issue a writ of certiorari to review the factual determination of the District Court, affirmed by the Court of Appeals, that the Federal Communications Commission ("FCC") was engaged in the joint conduct or disposition of "public business of the greatest import" when it sought to influence the policies of foreign telecommunications administrations, a determination which led both lower courts to conclude that the public could be excluded from the FCC's meetings with the foreign administrations only if the FCC complied with the requirements of the Government in the Sunshine Act, 5 U.S.C. § 552b?

2. Did the Court of Appeals err when it held that the FCC's *ultra vires* attempts to negotiate with the foreign administrations on behalf of respondent's competitors constituted final agency "action" which was subject to judicial review in the District Court, rather than a final agency "order" which was subject to review in the first instance in the Court of Appeals?

STATEMENT PURSUANT TO RULE 28.1

Respondent ITT World Communications Inc. is wholly owned, through an intervening subsidiary, by ITT Corporation ("ITT"). ITT or its subsidiaries also own more than twenty percent of the common stock of the following publicly-traded domestic corporations: Piper Jaffray, Inc. (25 percent) and Wheat First Securities, Inc. (25 percent).

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Respondent ITT World Communications Inc. ("ITT Worldcom") submits this brief in opposition to the petition for a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

In addition to the statutes cited in the FCC's petition, this case involves Section 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704, which provides in pertinent part:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. . . .

STATEMENT OF THE CASE

A. Introduction: The Court Of Appeals' Holding Is Limited To The Highly Unusual Facts Of This Case.

This controversy arose because the FCC ventured beyond its proper role as a regulatory agency and sought to influence the policies of foreign governments' telecommunications administrations. When it became enmeshed in foreign policy questions which are more properly the concern of the State Department, the FCC ran afoul of numerous provisions of the Communications Act, the Administrative Procedure Act, and the Government in the Sunshine Act.

The FCC seeks a writ of certiorari to review the way in which the Court of Appeals decided two of the many issues which were presented below. These issues are (1) whether the FCC's meetings with the foreign administrations are subject to the provisions of the Government in the Sunshine Act and (2) whether the District Court or the Court of Appeals had original jurisdiction to adjudicate ITT Worldcom's claim that the FCC was engaged in *ultra vires* conduct when it met with the foreign administrations. It must be emphasized preliminarily that these issues are raised in a highly unusual factual setting, and that the way in which the Court of Appeals decided them turned on the unique facts of this case. This is not a case in which the Court of Appeals considered the applicability of the Government in the Sunshine Act to garden variety administrative activities, or established jurisdictional rules for the judicial review of routine administrative decisions. Nor is this a case, as the FCC's petition seeks to characterize it, in which the FCC has done nothing more than informally exchange information with foreign governmental agencies. Rather, the Court of Appeals expressly held that the FCC was *not* merely exchanging information informally, and affirmed the District Court's factual findings that the FCC's closed meetings with the foreign administrations were "prearranged

conferences held to effectuate public business of the greatest import . . ." 43a, 699 F.2d at 1244.[1]

The Court of Appeals' opinion will be of precedential value only in the rare future case in which a court finds, as District Court and the Court of Appeals found in this case, that an administrative agency has improperly involved itself in substantive negotiations with foreign agencies. Because the Court of Appeals' decision will have no effect on the day-to-day functioning of administrative agencies and because the facts of this case are *sui generis*, the Court of Appeals' decision does not warrant this Court's review.

B. The Lower Courts Found That The FCC Attempted To Apply "Leverage" And Was In A "Negotiating Stance" During Its Closed Meetings With Foreign Telecommunications Administrations.

ITT Worldcom provides international telecommunications services and is regulated as a common carrier by the FCC pursuant to Title II of the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq*. To provide international services to its customers, ITT Worldcom has entered into arrangements, known as "operating agreements," with a number of the "foreign administrations" which own and operate the telecommunications networks in other nations. These foreign administrations are generally governmental agencies which enjoy a monopoly of telecommunications services within their respective countries.

Although the FCC has authority under the Communications Act to regulate the rates and practices of ITT Worldcom and other American carriers which provide international telecommunications services, it has no jurisdiction over the foreign governments' telecommunications administrations. The FCC does, however, have the ability to influence the foreign ad-

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1 Citations herein to the Court of Appeals' decision, *ITT World Communications Inc. v. FCC*, 699 F.2d 1219 (D.C. Cir. 1983), are to the appropriate page of Appendix A to the FCC Petition, followed by a citation to the Federal Reporter.

ministrations indirectly because under Section 214 of the Communications Act, 47 U.S.C. § 214, the FCC has the power to approve or disapprove the American carriers' applications for the construction of new overseas communications facilities, which are typically built jointly by the American carriers and the foreign administrations.[2]

For a number of years, the FCC, the American carriers and the foreign administrations have participated in a series of meetings, known as the "consultative process," that the FCC has described as "an ongoing process of exchange of information . . . which would lead to the formulation of . . . traffic forecasts, data bases and analytical aspects of facilities planning." *Policies for Overseas Common Carrier Facilities*, 73 F.C.C.2d 193, 195 (1975). The FCC has been represented at these meetings by the three commissioners who are members of its Telecommunications Committee, and who in that capacity have been delegated authority to rule on applications pursuant to Section 214 for permission to construct new international communications facilities. 47 C.F.R. § 0.215. Until the events which led to this litigation, the consultative process meetings were conducted openly, and interested American carriers, including ITT Worldcom, were free to attend and participate.

In 1977, the FCC authorized two domestic carriers, GTE Telenet Communications Corp. ("GTE") and Graphnet Systems, Inc. ("Graphnet") to provide certain international communications services. In a departure from its prior practice, the FCC granted GTE and Graphnet authority to provide international services even though neither carrier had negotiated the operating agreements with foreign administrations which would be necessary to provide those services. On appeal, the

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2 When this controversy arose, the principal American carriers which competed to provide international "record," or non-voice, communications services were ITT Worldcom, RCA Global Communications, Inc., Western Union International, Inc., and TRT Telecommunications Corp. These carriers are generally known as international record carriers, or "IRCs." American Telephone & Telegraph Co. is the dominant carrier of international "voice" communications.

Court of Appeals for the Second Circuit held that the FCC erred "in granting [GTE and Graphnet] perpetual authorizations irrespective of how long the consummation of necessary agreements with foreign communications administrations may take." *ITT World Communications, Inc. v. FCC*, 595 F.2d 897, 903 (2d Cir. 1979). The Second Circuit therefore remanded with instructions to the FCC to limit its authorizations of the two new carriers by providing that their authorizations would terminate unless GTE and Graphnet succeeded in negotiating satisfactory operating agreements within a reasonable period of time.[3]

GTE and Graphnet were not immediately successful in obtaining operating agreements from the foreign administrations, which apparently do not share the FCC's policy preference for a multiplicity of international carriers. The Court of Appeals found that "[i]n response, the Commission in 1979 turned to the consultative process as a forum for encouraging foreign cooperation with the newly authorized carriers," 5a, 699 F.2d at 1225, and attempted to use the consultative process "as the vehicle to assist Graphnet and [GTE] in obtaining interconnection agreements." 39a, 699 F.2d at 1242. To accomplish this objective, the FCC, for the first time, insisted on excluding the American carriers from its meetings with the foreign administrations:

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3 The Second Circuit also found merit in ITT Worldcom's appellate argument that the FCC had given GTE and Graphnet an unfair competitive advantage over ITT Worldcom and the other IRCs because the FCC authorized GTE and Graphnet to provide international services without subjecting them to the significant restrictions on their domestic activities which the FCC had traditionally placed on the IRCs. The Second Circuit, observing that the FCC then had pending before it the IRCs' requests for expanded domestic operating authority, required the FCC to place a condition on its authorizations of GTE and Graphnet which would permit the FCC to modify those authorizations to the extent necessary to correct any competitive imbalance which remained after the FCC had determined the proper scope of the IRCs' domestic operations. 595 F.2d at 910.

> At the October, 1979 [consultative process] meeting in Dublin, Ireland . . . the [FCC's] Telecommunications Committee persuaded its foreign counterparts to expand the meeting's focus to "include the United States' authorization of new telecommunications services and carriers," and to exclude representatives of American carriers from this part of the meeting. In addition to the Dublin meeting, a February, 1980 meeting in Ascot, England and an October, 1980 meeting in Madrid, Spain were closed during discussions of this topic.

5a-6a, 699 F.2d at 1225 (footnote omitted).

As the Court of Appeals observed, "[t]he specific nature of these off-the-record discussions is sharply contested and cuts to the heart of these appeals." 6a, 699 F.2d at 1225. The FCC has conceded that "international negotiation is the province of the State Department," *id.*, and its attorneys have consistently sought to characterize the closed meetings as nothing more than informal exchanges of information and views, no different from the exchanges that occur at consultative process meetings. The FCC, however, never explained why if this were so, it found it necessary to close these meetings, rather than following the open meeting format traditionally used in the consultative process. Further, statements made publicly by the FCC's commissioners and staff, when uncensored by counsel, enabled ITT Worldcom to prove that something far more significant was occurring at the closed meetings. More specifically, it appeared from these statements that the FCC was, despite its protestations to the contrary, negotiating with the foreign administrations by "advis[ing] the foreign administrations of a linkage between their cooperation with the newly authorized American carriers and the Commission's receptivity to their needs in other areas," such as the authorization of new overseas facilities. 7a, 699 F.2d at 1226.

For example, Charles Ferris, who was then Chairman of the FCC, testified at a Congressional hearing that the Telecommunications Committee "seeks to apply 'leverage' at the

[closed] meetings to 'bring a greater sense of urgency to our correspondents overseas so that they will give due consideration to the competitive environment . . . [we] have in the United States.' " 7a-8a, 699 F.2d at 1226, n. 26. Similarly, Commissioner Fogarty stated during a speech in Montreal that because the FCC had accommodated the European adminstrations by authorizing a new transatlantic communications cable, known by the acronym "TAT," "the FCC expects a 'tit' for the 'Tat' and a '*quid pro quo*.' " *Id.* A third commissioner, Commissioner Washburn, conceded in an open FCC meeting that the Telecommunications Committee was "talking to people in a negotiating stance abroad." *Id.* After reviewing statements such as these, the Court of Appeals concluded that "there is considerable evidence that would appear to contradict the Commission's characterization of the discussions as mere unofficial 'information exchanges.' " 7a, 699 F.2d at 1225. The Court of Appeals went on to describe the substantive significance of the closed meetings in the following terms:

> Commission representatives have described the closed exchanges as a "mechanism to narrow differences and to move toward consensus on common principles and approaches;" the Commission acknowledges that such consensus is designed to "lead ultimately to operating agreements for ITT's competitors."
>
> * * *
>
> The CP discussions are not "chance meetings," "social gatherings," or "informal discussions" among members, but prearranged conferences held to effectuate public business of the greatest import. They focus on concrete issues and are conducted to build a "consensus" that will have far-reaching effects on the structure of the communications industry. They are in short, an integral part of the Commission's policymaking processes, and as such they constitute the "conduct . . . of official agency business."

7a, 43a, 699 F.2d at 1226, 1244 (footnote omitted).

C. The Proceedings Before The FCC, The District Court And The Court Of Appeals Led The Court Of Appeals To Conclude That The FCC Was In Fact Conducting Official Business When It Met With The Foreign Administrations.

The FCC's effort to encourage or coerce the foreign administrations to favor ITT Worldcom's competitors was obviously a cause for concern to ITT Worldcom because the foreign administrations, unlike the FCC, did not have a policy favoring competition, and therefore any action by the FCC which forced the foreign administrations to deal with GTE or Graphnet might make them less willing to continue existing operating agreements with ITT Worldcom, or to give ITT Worldcom new operating agreements for services which ITT Worldcom wished to introduce in the future.

1. The Rulemaking Petition Before The FCC.

On October 29, 1979, ITT Worldcom filed a petition for administrative rulemaking with the FCC. This petition did not seek any form of relief from the closed meetings which had already occurred, nor did ITT Worldcom seek a determination of the legality of the FCC's past conduct. Instead, ITT Worldcom sought prospective relief to prevent the FCC from abusing the consultative process in the future, and its petition was thus addressed largely to the FCC's discretion. ITT Worldcom requested, *inter alia*, that the FCC adopt regulations which would delineate the authority of the commissioners and staff who met with the foreign administrations, and clearly indicate that they had no power to negotiate or bind the FCC. ITT Worldcom also asked that the FCC adopt procedural rules for the meetings which would provide that the meetings would ordinarily be open, and that interested parties would receive notice of the meetings, and an opportunity to comment on the subjects which the FCC proposed to discuss with the foreign administrations.

The FCC took no action on ITT Worldcom's rulemaking petition until after ITT Worldcom had brought suit in the District Court. The FCC then denied the petition and, as the

Court of Appeals observed, "there is evidence suggesting that the rulemaking denial was crafted in part to enhance the Commission's litigation posture in the district court action." 50a, 699 F.2d at 1247-48.[4] In addition to denying ITT Worldcom's petition for prospective relief, the FCC gratuitously volunteered a lengthy self-serving denial that it had acted improperly in the closed meetings it had already held with the foreign administrations. The FCC subsequently cited this portion of the rulemaking denial to bolster its argument that the legality of its actions at those meetings could be adequately reviewed by the Court of Appeals on direct appeal.

With respect to the specific procedures which ITT Worldcom recommended the FCC follow at its meetings with the foreign administrations, the FCC purported to find merit in most of ITT Worldcom's suggestions, including its proposal that the meetings ordinarily be open. However, it stated that it would follow these procedures as a matter of discretion, without adopting any binding rules, and the FCC "expressly reserve[d] the right to depart from [these procedures] where necessary. . . ." 11a, 699 F.2d at 1228.[5]

2. The District Court Action.

ITT Worldcom filed suit in the United States District Court for the District of Columbia on February 12, 1980. As its first claim for relief, ITT Worldcom sought judicial review of what

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4 The evidence to which the Court of Appeals referred consists of statements by the FCC's general counsel and staff at the meeting at which the FCC denied ITT Worldcom's rulemaking petition. General Counsel Bruce advised the FCC that it should "deal with this petition at this time because of the pending litigation in the District Court," and an FCC staff member told the commissioners that the draft order which had been circulated would be changed to "help it coordinate with the collateral court suit that ITT has filed in the District Court. . . ." 50a, 699 F.2d at 1248, n. 202.

5 Despite the FCC's protestations that it would ordinarily follow these procedures, in actual fact it simply ignored them when it next met with the foreign administrations.

had actually transpired at the Telecommunications Committee's closed meetings with the foreign administrations, and a determination that the FCC had in fact engaged in *ultra vires* attempts to negotiate with those foreign governmental entities on behalf of ITT Worldcom's competitors. In contrast to the discretionary relief which ITT Worldcom had sought from the FCC in its rulemaking petition, ITT Worldcom's complaint in the District Court prayed for an injunction which would permanently enjoin the FCC from continuing its *ultra vires* misconduct. ITT Worldcom's complaint also sought an order requiring the FCC to comply with the Government in the Sunshine Act when it met with the foreign administrations, and asked the District Court to direct the FCC to release certain documents related to the closed meetings which the FCC had refused to produce in response to a request ITT Worldcom had made pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C.§ 552.

The District Court's disposition of ITT Worldcom's lawsuit was made on cross-motions for summary judgment. Pursuant to a local court rule, ITT Worldcom submitted a statement of the facts it contended were not in dispute on its motion for summary judgment on its Government in the Sunshine Act claim. As part of this statement, ITT Worldcom put before the District Court what ITT Worldcom asserted were true reports and transcripts of the concessions made by the FCC's commissioners and staff that the Telecommunications Committee was applying "leverage" and "in a negotiating stance" when it met with the foreign administrations. See pp. 6-7, above. In its response to ITT Worldcom's statement, the FCC agreed that the facts were not in dispute, and admitted that its representatives had made the statements which ITT Worldcom quoted. The FCC submitted no affidavit or other evidence to describe what it claimed occurred at the closed meetings with the foreign administrations. Its principal defense to ITT Worldcom's claim was a legal argument that the Act could not apply to the closed meetings because the Telecommunications Committee which represented the FCC at these meetings constituted less than a quorum of the full FCC.

While the FCC did not submit any evidentiary opposition to ITT Worldcom's motion for summary judgment on its Government in the Sunshine Act claim, the FCC's legal memoranda nonetheless "engaged in much obfuscation about the substance of [its] discussions" at the closed meetings. 29a, 699 F.2d at 1237. Much of the confusion in the FCC's papers undoubtedly resulted from the FCC's inability to give a consistent description of what occurred at the meetings without compromising its legal position on one or more of the claims which ITT Worldcom had made against it. For example, in opposition to ITT Worldcom's Government in the Sunshine Act claim, the FCC continued to argue that the closed meetings were only "informal" information exchanges at which no deliberations occurred and no official business was conducted. However, in opposing ITT Worldcom's attempt to compel the disclosure of documents under FOIA, the FCC took the position that background memoranda prepared for the Telecommunications Committee's use before the closed meetings were "predecisional," and therefore exempted from disclosure by the "deliberative process" privilege of FOIA, 5 U.S.C.§ 552(b)(5).

Having before it ITT Worldcom's unrebutted evidence that the Telecommunications Committee was engaged in substantive discussions with the foreign administrations, and faced with the FCC's inability to give a coherent account of the closed meetings even in its unsworn papers, the District Court held that the FCC had failed to meet its burden under the Goverment in the Sunshine Act to demonstrate that the Telecommunications Committee was not conducting official agency business on the FCC's behalf when it met with the foreign administrations. *See* 5 U.S.C. § 552b(h)(2).[6] The District Court also directed the FCC to disclose the documents which ITT Worldcom sought under FOIA. Finally, the District Court dismissed ITT Worldcom's claim based on allegations of *ultra vires* conduct, on grounds of ripeness and standing which

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6 This section of the Government in the Sunshine Act gives the district courts jurisidiction to enforce the Act and provides that in any such action "[t]he burden is on the defendant to sustain his action."

were rejected by the Court of Appeals and which are not raised by the FCC's petition for a writ of certiorari.

3. The Court of Appeals' Decision.

ITT Worldcom's petition for review of the FCC's rulemaking denial and the parties' cross appeals from the District Court's judgment were argued before the same panel of the Court of Appeals on April 16, 1982. In its decision entered on February 1, 1983, the Court of Appeals accepted the District Court's factual conclusion that the Telecommunications Committee was conducting official agency business at the closed meetings and affirmed its holding that the FCC could continue to close these meetings only if it complied with "stringent closure provisions" of the Government in the Sunshine Act. 54a, 699 F.2d at 1249.[7]

The Court of Appeals reversed the District Court's dismissal of ITT Worldcom's first claim for relief, based on its allegations that the FCC had conducted *ultra vires* negotiations with the foreign administrations. In ruling on the jurisdictional question which the FCC seeks to raise in this Court, the Court of Appeals found that the FCC's attempts to coerce the foreign administrations into giving GTE and Graphnet operating agreements would not, by their nature, result in a final FCC "order" which could be reviewed directly by the Court of Appeals. The Court of Appeals therefore held that the misconduct alleged in ITT Worldcom's complaint fell within the District Court's residual jurisdiction to review final agency "action" which is not a final "order" appealable to the Court of Appeals. The court rejected the FCC's argument that it should review the legality of the FCC's conduct at the meetings when it ruled on ITT Worldcom's appeal from the FCC's

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7 The Court of Appeals' holding that the FCC had violated the Government in the Sunshine Act was not the first appellate decision finding that the FCC's zeal for encouraging competition had led it to ignore statutory restrictions on its authority. *See ITT World Communications Inc. v. FCC*, 635 F.2d 32 (2d Cir. 1980).

rulemaking denial. The Court of Appeals held that it had no factual or evidentiary "record" before it on the rulemaking appeal that would allow it to determine what had actually occurred at the closed meetings and found that in the absence of such a record, *de novo* fact-finding by the District Court was necessary for adequate judicial review.[8]

D. Postscript: Contrary To The FCC's Representations To This Court, The Decisions Of The Lower Courts Have Not Halted The Consultative Process.

To convince the Court of the importance of this case, the FCC suggests in its petition that the lower courts' construction of the Government in the Sunshine Act has brought the consultative process to a halt, because at the "last CP session" held in Madrid, Spain in October 1980, the foreign administrations "objected strongly" to the steps which were taken to comply with the District Court's order. FCC Petition at 21, n.19.

The FCC's description of the Madrid gathering as the "last" consultative process meeting is completely false. After the Madrid meeting, another consultative process meeting was held as scheduled in New Orleans on February 17 and 18, 1981. In compliance with the District Court's order, the meeting was open, as consultative process meetings had traditionally been, and the foreign administrations participated fully. The New Orleans meeting was described in the trade press as "totally harmonious in tone, and one of the most successful of the series of consultative process sessions which have been held in the past several years." *Telecommunications Reports*, Vol. 47, No. 8, p. 20 (February 20, 1981).

The FCC's reluctance to schedule consultative process meetings since the New Orleans meeting is not caused by the lower

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8 In portions of its opinion which no party seeks to bring before this Court, the Court of Appeals also reversed the FCC's denial of ITT Worldcom's rulemaking petition, and reversed in part the District Court's ruling sustaining ITT Worldcom's FOIA claims.

courts' decisions, but rather appears to have resulted from the sharp criticism which Senator Goldwater, the Chairman of the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, has made of the FCC's participation in the consultative process. As Senator Goldwater stated at a congressional hearing held contemporaneously with the New Orleans meeting:

> I would note for the record that the Acting Chairman of the FCC could not be present for today's hearings because he and Commissioners Washburn and Fogarty and five top staff members are in New Orleans attending a senior level meeting of the North Atlantic Consultative Process.
>
> I want to take this opportunity to comment on the Commission's activities in this area.
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> The FCC's participation in the planning of international communications facilities has been of concern to me for several years. What initially was an attempt to resolve disagreements over authorization for construction of the TAT-7 submarine cable, has become a permanent process involving the FCC in discussions and decisions properly left to those private corporations responsible for providing the capital to construct the facilities, and the provision of the service over those facilities.

Hearings on S. 271, Serial No. 97-5, 97th Cong., 1st Sess. 2 (February 18, 1981). Senator Goldwater further stated that he expected "to introduce a bill that more narrowly defines the Commission's role" and that "budgetary constraints argue for a careful examination of the Commission's activities." *Id.*[9]

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9 On June 1, 1981, the FCC released a Notice of Inquiry which initiated a proceeding to plan new communications facilities for the Pacific region. ***Inquiry into the Policies to be Followed in the Authorization of Common Carrier Facilities to Meet Pacific Region Telecommunications Needs During the 1981-1995 Period***, FCC 81-243, 46 F.R. 31286 (June 15, 1981). The Notice of Inquiry stated that "given the U.S. Congress' desire to keep Commission expenditures at a minimum,

Because it was the FCC, rather than the foreign administrations, which insisted that the closed meetings be conducted in private, there is no reason to assume that the lower courts' holdings have deterred the foreign administrations from continuing to participate in the informal exchange of facilities planning information which has traditionally occurred at the open consultative process meetings. What the lower courts' decisions stopped was the FCC's attempt to apply "leverage" and "negotiate" on behalf of ITT Worldcom's competitors, because the FCC knows these efforts to be improper and will not expose them to public scrutiny at an open meeting with the foreign administrations.[10]

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we expect our role to be restricted principally to the compilation and evaluation of a record" developed from information supplied by the American carriers, and that in contrast to the North Atlantic planning process, the FCC would not be "exchanging information directly with interested foreign entities on a regular basis." 46 F.R. at 31289.

10 Congressional passage of the legislation which was before Senator Goldwater's subcommittee when he made the remarks quoted above has a bearing on the significance of the issues raised by the FCC's petition. In the Record Carrier Competition Act of 1981, P.L. 97-130, 95 Stat. 1687, now codified as 47 U.S.C. § 222, Congress directly addressed the concerns of carriers such as GTE and Graphnet which have been unable to negotiate operating agreements with the foreign administrations. Under the Act, GTE and Graphnet now have the right to obtain international transmission services through the interconnection of their domestic facilities with ITT Worldcom and the other established IRCs. With the benefit of these arrangements, the new carriers can now provide international services to their customers without obtaining the direct operating agreements with the foreign administrations which the FCC's Telecommunications Committee sought to negotiate on their behalf during the closed meetings.

REASONS FOR DENYING THE PETITION

I. The Court Of Appeals Properly Applied The Provisions Of The Government In The Sunshine Act To The Unusual Facts Of This Case.

The FCC's petition for a writ of certiorari is nothing more than a request that this Court review the fact-finding of the lower courts, which rejected the FCC's unsubstantiated claim that its Telecommunications Committee did nothing more than "informally" exchange information with the foreign administrations when they met behind closed doors. In introducing its discussion of the Government in the Sunshine Act, the FCC's petition argues that the Court of Appeals "has held that the Sunshine Act applies to informal exchanges, overseas, by agency delegates with their foreign counterparts. . . ." FCC Petition at 11. The way in which the FCC seeks to frame the issue presented by its petition simply ignores the Court of Appeals' express recognition that the Act "does not *per se* forbid all informal off-the-record discussions between a quorum of an agency and outside parties. . . ." 43a, 699 F.2d at 1244. The Court of Appeals, however, specifically decided that the FCC's closed meetings were *not* " 'informal discussions' between members," 43a, 699 F.2d at 1244, but rather were "prearranged conferences held to effectuate public business of the greatest import," which "focus[ed] on concrete issues" and which were "in short, an integral part of the Commission's policy making processes. . . ." *Id.*[11]

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11 The American Bar Association ("ABA") has filed a memorandum as *amicus curiae* in support of the FCC's petition. The ABA's memorandum accepts the way in which the FCC's petition characterizes the closed meetings as nothing more than informal and general discussions (although the ABA cites no portion of the Court of Appeals' decision which supports that characterization). The language quoted above makes clear that the Court of Appeals' decision did not deal with "informal" discussions and that the ABA's concerns are unfounded.

It is axiomatic that this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Berenyi v. Immigration Director*, 385 U.S. 630, 635 (1967), *quoting Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). It would be particularly inappropriate for the Court to do so in this case because the FCC never attempted to convince the trial court that, as a factual matter, the Telecommunications Committee confined itself to "informal information exchanges" during its closed meetings with the foreign administrations. When it responded to ITT Worldcom's summary judgment motion, which relied on the statements of responsible FCC officials that the Telecommunications Committee was "applying leverage," "in a negotiating stance" and seeking "tit for Tat," the FCC conceded that the facts were not in dispute, in what was presumably a litigation strategy designed to avoid discovery in which ITT Worldcom would develop further evidence of what really went on at the closed meetings.[12] It was only *after* this litigation strategy backfired on the FCC and judgment was entered against it in the District Court that the FCC submitted the two affidavits, in support of its unsuccessful applications for a stay pending appeal, on which it now relies to support its argument that the Telecommunications Committee was merely exchanging information informally. The Court of Appeals might properly have rejected the FCC's post-judgment attempts to supplement the record, but instead fully considered these affidavits in reaching its decision. The Court of Appeals, however, found that these two "vague, conclusory and contradictory" affidavits, which, like the FCC's legal memoranda, were carefully drawn to avoid prejudicing the FCC's position on other points in dispute, did not raise genuine issues of material fact, 45a, 699 F.2d at 1245, n.179, and that the FCC had not met its burden of proof under

12 ITT Worldcom served interrogatories and document demands with its complaint. The FCC's responses to these discovery demands were inadequate, and ITT Worldcom's motion to compel pursuant to F.R.C.P. 37 was pending at the time the District Court entered judgment.

the Government in the Sunshine Act "to overcome the presumption in favor of openness." 43a, 699 F.2d at 1244. *See* 5 U.S.C. § 552b(h)(2). For the FCC to seek a third opportunity to prove in this Court that the Telecommunications Committee was only exchanging information informally with the foreign administrations, when both lower courts have rejected this claim and there is no credible evidence in the record to support it, is an improper invocation of this Court's jurisdiction on certiorari.[13]

A. The Court Of Appeals Properly Held That The Telecommunications Committee Was "Authorized" To Act On Behalf Of The FCC At The Closed Meetings With Foreign Administrations.

The requirements of the Government in the Sunshine Act are applicable both to the agency itself, and to "any subdivision thereof authorized to act on behalf of the agency." 5 U.S.C. § 552b(a)(1). The legislative history of the Act demonstrates that a subdivision is subject to the Act even if it is not authorized to take final action on behalf of the full agency:

> A subdivision of an agency . . . is covered if it is authorized to act on behalf of the agency. Panels, or regional boards of an agency are covered if authorized to act on behalf of the agency, even if their action is not final in nature. *Thus, panels or boards authorized to submit recommendations, preliminary decisions, or the like to the full commission, or to conduct hearings on behalf of the agency are required to comply with the provisions of Section 552b.*

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13 It should be noted that the FCC has consistently denied ITT Worldcom's counsel the opportunity to cross examine its affiants on the conclusory statements made in their affidavits. The FCC refused to produce the first affiant, Commissioner Lee, for examination at the District Court's hearing on the FCC's stay application in that Court. When the FCC moved for a stay pending appeal four months later in the Court of Appeals, its motion was denied after the FCC declined ITT Worldcom's request to depose FCC staff member Demory, who had submitted a second affidavit in support of that motion.

H. Rep. No. 94-880, 94th Cong., 2d Sess. 7 (1976) (emphasis supplied) (hereinafter, "*House Report*"). *Accord* S. Rep. No. 94-354, 94th Cong., 1st Sess. 17 (1975) (hereinafter, "*Senate Report*").

On one level, the FCC's petition merely asks this Court to review the lower courts' factual findings, when the FCC argues that "there was no basis for the Court of Appeals factfinding" that the Telecommunications Committee was "authorized" to act on behalf of the full FCC at the closed meetings. FCC Petition at 13. The Court of Appeals, however, held that "[t]he Commission concedes elsewhere that the commissioners attend the meetings in their official capacities and *qua* the Telecommunications Committee, and the record amply shows that the Committee acts on the Commission's behalf in seeking to effectuate official agency business." 53a, 699 F.2d at 1249 (footnote omitted).[14]

The FCC also argues in this Court that notwithstanding the lower courts' factual findings, a subdivision can *never* be "authorized" to act on behalf of the full agency for purposes of the Government in the Sunshine Act "unless it has received an *official* delegation of authority," presumably by regulation or formal agency order. FCC Petition at 13 (emphasis supplied). The FCC's argument, which is unsupported by citations to precedent or legislative history, would, as the Court of Appeals recognized, allow an agency to evade the requirements of the Act at will simply by ignoring the formalities of delegation. In this very case, the Court of Appeals held, in a portion of its decision which the FCC does not seek to appeal, that the FCC violated Section 5(d) of the Communications Act, 5 U.S.C. § 155(d)(1), when it failed to delegate, "by published rule or order," the authority which the Telecommunications Committee could properly exercise at the closed

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14 The footnote accompanying the Court of Appeals' statement cross-references the FCC's statements, pleadings and affidavits, and the FOIA material submitted by ITT Worldcom, which "amply" support the Court of Appeals' factual conclusion.

meetings. 52a, 699 F.2d at 1248. There is certainly nothing novel about the Court of Appeals' holding that the FCC ought not be allowed to rely on its violation of the Communications Act to justify its failure to comply with the Government in the Sunshine Act.

Furthermore, even if this Court were to accept the FCC's argument, the Telecommunications Committee's existing "official" authorization under 47 C.F.R. § 0.205 is sufficient to support the Court of Appeals' finding that the Telecommunications Committee is "authorized" to act on behalf of the full FCC. As discussed above, this regulation delegates authority to the Telecommunications Committee to act on applications for the construction of new international communications facilities. The only justification which the FCC has ever offered for the Telecommunications Committee's participation in the closed meetings is that the meetings permit the Committee's members to acquire information which will better enable them to discharge this delegated function. Thus, even on the view of the facts most favorable to the FCC, the Telecommunications Committee's closed meetings with the foreign administrations are undeniably part of that Committee's efforts to perform duties which have been officially delegated to it by the full FCC.[15]

B. The Court of Appeals Properly Held That The Telecommunications Committee Was Engaged In The Joint Conduct of Official Agency Business During The Closed Meetings.

In attacking the lower courts' factual determination that the Telecommunications Committee was engaged in the joint conduct of official agency business during the closed meetings

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15 The FCC argues in its petition that the Telecommunications Committee does not actually vote upon any applications for new facilities at the closed meetings. This does not excuse its failure to open the meetings because under the Government in the Sunshine Act, "[t]he whole decision-making process, not merely its results, must be exposed to public scrutiny." *Senate Report* at 17-18. *Accord House Report* at 3, 8. See pp. 20-23, below.

with foreign administrations, the FCC criticizes the Court of Appeals' supposed failure to make a separate holding that the Committee was "deliberating" when it conducted that business. The Court of Appeals did not address this point at length because the FCC did not press the argument below. However, the legislative history demonstrates that the use of the word "deliberation" in the Government in the Sunshine Act was not intended to create a prerequisite to the Act's application separate and distinct from the requirement that the agency be engaged in the joint "conduct" of agency business. Rather, the two words are meant to be read together, and are intended to require only that the agency's actions be characterized by a degree of formality before the Act is invoked:

> The words "deliberation" and "conduct" were carefully chosen to indicate some degree of formality is required before a gathering is considered a meeting for purposes of this section.

Senate Report at 18. The legislative history contrasts meetings involving deliberations and the conduct of business with "chance encounters," "purely social gatherings," "luncheons" and the like, where no agency business is conducted. *Id. Accord House Report* at 3.

The FCC's petition argues that the Telecommunications Committee was not conducting "official agency business" at the closed meetings, but this argument is based on the factual predicate, rejected by the Court of Appeals, that the Committee was doing nothing more than "exchanging information" with the foreign administrations. The FCC does not suggest that if, as the lower courts found, its representatives were seeking to coerce or cajole the foreign administrations into giving operating agreements to GTE and Graphnet, these substantive discussions would not constitute, in the Court of Appeals' words, "public business of the greatest import."

Further, even assuming *arguendo* that the FCC had limited itself to "exchanging information" with the foreign administrations, it would by no means follow that the Government in

the Sunshine Act is inapplicable to the closed meetings. As the FCC points out, the Act was not intended to apply to all "informal background discussions which clarify issues and expose varying views." *Senate Report* at 19. However, the overriding goal of the Act was to expose to public scrutiny "not just the formal decision-making or voting but *all* discussions relating to the business of the agency." *House Report* at 8. "The whole decision-making process, not merely its results, must be exposed to public scrutiny." *Senate Report* at 18. The legislative history demonstrates that the Act was intended to apply to the entire information-gathering process which precedes an agency decision.[16]

The question of whether an agency is informally obtaining "background" information unrelated to any specific proceeding or is gathering information as a predicate to decision-making is obviously one of fact. In the present case, the Court of Appeals found that the closed meetings are "prearranged conferences" that "focus on concrete issues" (*i.e.*, GTE's and Graphnet's requests for operating agreements and the need for new international facilities). The Court of Appeals further found that the FCC's representatives "convey the information and views 'exchanged' at the meetings to the full commission for its consideration." 37a, 699 F.2d at 1241. While the FCC argues that the Court of Appeals did not find "that the discussions focused on any discrete proposals pending or likely to arise before the agency," FCC Petition at 18, the Court of Appeals actually found that "reference to the Commission's FOIA materials . . . suggests that a number of pending

16 For example, the legislative history reveals that "[p]anels or boards composed of two or more agency members and authorized to submit recommendations, preliminary decisions or the like to the full commission, or to conduct hearings on behalf of the agency, are required by the [Act] to open their meetings." *Senate Report* at 17. The Act applies to "meetings outside the agency . . . if they discuss agency business. . . . ," *Senate Report* at 18, and the Act's open-meeting requirement "does not exclude the situation where a subdivision authorized to act on behalf of the agency meets with other individuals concerning the conduct or disposition of agency business." *House Report* at 8.

docket proceedings have in fact been discussed at the CP meetings." 50a, 699 F.2d at 1247. And while the FCC argues that the Telecommunications Committee's discussions at the closed meetings "did not predetermine or relate to any future FCC decision" because the FCC has already authorized GTE and Graphnet to provide international service, FCC Petition at 18, any operating agreement which GTE or Graphnet obtains as a result of the closed meetings, and any new international facilities which the foreign administrations seek as a "*quid pro quo*," will in fact require future approval by the FCC or its Telecommunications Committee pursuant to Section 214 of the Communications Act.[17] Thus, even if, as the FCC argues, it only "exchanged information" at the closed meetings, there are ample factual grounds for sustaining the Court of Appeals' conclusion that the closed meetings are "an integral part of the Commission's policymaking processes." 43a, 699 F.2d at 1244.

C. Because The Court of Appeals' Decision Is Based On A Highly Unusual Set Of Facts, Review By This Court Is Not Warranted.

Contrary to the FCC's argument in this Court, the Court of Appeals expressly refused to rule that informal information exchanges between agencies and third parties are *per se* subject to the Government in the Sunshine Act. 42a, 699 F.2d at 1244.[18] To avail itself of the precedential effect of the Court of

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17 When the FCC originally authorized GTE and Graphnet to provide international service, it retained jurisdiction to rule on the adequacy of any operating agreements they negotiated before the new carriers initiated service. *ITT World Communications, Inc. v. FCC*, *supra*, 595 F.2d at 902.

18 The Court of Appeals did observe that the "informal information exchange" exception to the Act must be carefully applied to avoid sweeping within it the decision-oriented information gathering process which Congress intended to be conducted in public. 42a-43a, 699 F.2d at 1243-1244. Future cases will have to delineate the boundaries between these two functions. The Court of Appeals had no occasion to do so, because it found that the FCC was seeking the foreign adminis-

Appeals' decision, a future litigant will need to demonstrate that an administrative agency is using closed-door meetings with foreign governmental agencies "as a vehicle" to urge the foreign governments to accept the American agency's substantive policies. 39a, 699 F.2d at 1242. Because the conduct of the nation's foreign policy is committed to the State Department, the possibility of a similar case arising in the future is remote. The problem presented by this case is essentially "academic" or "episodic," and does not merit consideration by this Court. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955).[19]

Further, in considering the significance of the Court of Appeals' decision, it is important to recognize that the Government in the Sunshine Act does not create an absolute rule requiring open meetings, but rather includes a number of exceptions which permit an agency to close a meeting in appropriate circumstances. Both the District Court and the Court of Appeals specifically invited the FCC to avail itself of 5 U.S.C. § 552b(c)(9)(B), which allows an agency to close a meeting if necessary to prevent "the premature disclosure of [information] which would . . . be likely to significantly frustrate implementation of a proposed agency action." Any agency with statutory authority to negotiate with third parties may presumably use this exemption to close its negotiating sessions on the ground that premature disclosure of the parties' negotiating positions would frustrate the negotiations. That the FCC could not take advantage of this exception to the Act without effectively admitting ITT Worldcom's allegations that it was engaged in *ultra vires* misconduct hardly makes this a case of general applicability or concern.

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trations' assent to its policies and not merely gathering information. This case therefore does not present an appropriate opportunity for this Court to consider precisely where the line between "informal" and "formal" information exchanges should be drawn.

19 It should be noted that the Court of Appeals' decision will have no effect on the State Department's conduct of foreign affairs because the State Department is not a collegial body and therefore is not subject to the Government in the Sunshine Act.

II. The Court Of Appeals Properly Held That The District Court, Rather Than The Court Of Appeals, Should Adjudicate ITT Worldcom's Claim That The FCC Engaged In *Ultra Vires* Conduct During Its Closed Meetings With The Foreign Administrations.

This Court's decisions have established a strong presumption that agency actions are subject to judicial review. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). When the FCC acts by way of an "order" in a formal administrative proceeding, Section 405 of the Communications Act, 47 U.S.C. § 405, permits an aggrieved party to appeal directly to the Court of Appeals. However, this review procedure is applicable *only* to "final orders." *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 415-16 (1942). The judicial review provisions of the Administrative Procedure Act are broader than those of the Communications Act, in that they provide for the review of final agency "actions" which do not take the form of final "orders," 5 U.S.C. § 704, and the District Court has general "federal question" jurisdiction of cases brought under the APA. *Califano v. Sanders*, 430 U.S. 99, 105 (1977). The District Court's "jurisdiction is thus residual," in that it permits the review of all forms of final agency action which cannot be brought directly to the Court of Appeals as final orders. *City of Rochester v. Bond*, 603 F.2d 927, 935 (D.C. Cir. 1979).

The Court of Appeals properly held in this case that ITT Worldcom's allegations of *ultra vires* misconduct fell within the District Court's residual jurisdiction. As the Court of Appeals pointed out, "the *ultra vires* count requires scrutiny of conduct occurring outside the formal administrative process." 15a, 699 F.2d at 1230. The FCC's efforts to negotiate with foreign governments therefore did not, and could not, result in a "final order" reviewable in the Court of Appeals.

The FCC argues that the Court of Appeals should have determined the legality of the FCC's conduct at the closed meetings on direct appeal from the FCC's denial of ITT

Worldcom's rulemaking petition because ITT Worldcom raised, or could have raised, this issue in the rulemaking proceedings. As the Court of Appeals observed, this argument "blurs an important distinction between the rulemaking petition and the *ultra vires* count." 14a, 699 F.2d at 1229. In the rulemaking proceeding, ITT Worldcom did not seek a determination of the legality of the FCC's conduct at past meetings, and it would be naive to expect that the FCC would have confessed error if ITT Worldcom had done so. Indeed, the FCC agreed with ITT Worldcom in its rulemaking denial that it lacked authority to negotiate with foreign administrations, and it added a gratuitous denial that it had done so in the past.

The "gravamen of the *ultra vires* count [in the District Court] was very different," because ITT Worldcom there sought to prove that notwithstanding the FCC's self-serving statements, the FCC "has *in fact* secretly exceeded [its] authority and will not admit to having done so." 14a, 699 F.2d at 1229. It would have been literally impossible for ITT Worldcom to prove these allegations, without any "pretrial" discovery, in the notice-and-comment rulemaking proceeding before the FCC. As the Court of Appeals held, the record on the rulemaking appeal was "patently inadequate" to permit the Court of Appeals to determine the legality of the FCC's actions.

> We are asked, in essence, to approve of actions about which we know almost nothing. The record consists simply of the Commission's assertions that it has not negotiated, and of numerous statements by agency members that would appear to undercut these assertions. Self-serving representations are no substitute for an adequate record that would enable us to determine with confidence the actual scope of the Commission's endeavors.

48a-49a, 699 F.2d at 1247. The Court of Appeals therefore held that "the jurisdiction of the district courts is properly invoked" because "*de novo* judicial fact-finding is necessary for a fair examination of the disputed issues." 14a, 699 F.2d at 1229.

In reaching this result, the Court of Appeals was careful to point out that its decision was not intended to sanction review in the District Court of an action which "is interlocutory in nature and can be corrected on court-of-appeals scrutiny of a subsequent, final action." 16a, 699 F.2d at 1230. The Court of Appeals held, however, that effective future review was not possible here because the FCC's activities at the closed meetings "are not calculated to result in a final order, but rather to lead to unreviewable actions by foreign administrations." *Id.*

In short, the Court of Appeals permitted District Court review of the FCC's actions in this case only because (1) the actions themselves do not constitute a "final order" reviewable in the Court of Appeals and (2) the Court of Appeals will not have an opportunity to determine the legality of the FCC's conduct on appeal from any future final order. The Court of Appeals' recognition of this limited residual jurisdiction in the District Court will not, as the FCC argues, disrupt the functioning of the administrative process but, to the contrary, is necessary to effectuate this Court's holdings that adequate judicial review is presumptively available to all aggrieved parties.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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